

Receipt number 9998-5496598

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS**

TDB RESOURCES, L.P.,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Case No. 19-989 C

Judge \_\_\_\_\_

**COMPLAINT**

Plaintiff TDB RESOURCES, L.P., for its Complaint against Defendant, the UNITED STATES, alleges as follows:

**GENERAL NATURE OF THE ACTION**

1. This is an action by the Plaintiff seeking a refund of nearly two million dollars it paid for two federal oil and gas leases in North Dakota that turned out to be invalid because much of the land purportedly being leased was not federal land.

2. After both the Bureau of Land Management and the Office of Natural Resources Revenue denied Plaintiff's request for a refund of the bonus money and rentals paid therefor, Plaintiff filed an appeal with the Interior Board of Land Appeals, which failed to grant Plaintiff a refund.

3. Having exhausted its administrative remedies, and the 33-month period provided by 30 U.S.C. § 1724 having lapsed, Plaintiff now brings this legal action.

## **PARTIES**

4. Plaintiff TDB Resources, L.P., is a Delaware limited partnership with its primary office in Salt Lake City, Utah.

5. Defendant, the United States, issued the federal oil and gas leases at issue in this case, Leases NDM 105576 and NDM 105578 (the "Leases") and represented itself as the Lessor under the Leases and the owner of the leased property.

## **JURISDICTION AND VENUE**

6. This Court has subject matter under 28 U.S.C. 1491(a)(1) (Tucker Act) because this is a civil action against the United States arising under the laws thereof, including, without limitation, 30 U.S.C. § 1701 et seq. and 43 U.S.C. § 1734.

7. Additionally, subject matter jurisdiction is appropriate under the Tucker Act because this action is based on express and implied contracts with the United States, including, without limitation, Federal Oil and Gas Leases NDM 105576 and NDM 105578.

8. Subject matter jurisdiction is also appropriate under 30 U.S.C. § 1724.

9. Venue lies in this Court pursuant to 28 U.S.C. § 1491(a)(1).

## **FACTUAL BACKGROUND**

### **A. The Leases.**

10. On July 16, 2013, pursuant to a Notice of Competitive Oil and Gas Lease Sale (the "Lease Sale Notice") the federal Bureau of Land Management (BLM) held a

competitive sale of "Federal lands in the states of Montana, North Dakota and South Dakota for oil and gas leasing" at its offices in Billings, Montana.

11. A copy of the Lease Sale Notice (in relevant part) issued by the Montana<sup>1</sup> State Office of the BLM is attached hereto as Exhibit A.

12. Among other things, the Lease Sale Notice instructs the potential bidders at the sale to "make oral bids on a per-acre basis for all acres in a parcel" and that "[y]ou must calculate your bonus bid and advance rental payment on the gross (total) acreage in the parcel." (*See* Exhibit A hereto, second page (pages are not numbered).)

13. The Lease Sale Notice further stated that "If the United States owns less than 100 percent of the oil and gas rights in a parcel, the parcel will reflect the percentage of interest the United States owns." (*Id.*)

**1. Lease '576 (Parcel 31).**

14. The Lease Sale Notice identified the following as among the "Federal lands" made available for competitive sale: "PARCEL NUMBER 07-13-31, NDM 105576, NDM 97300-M3, T. 153 N, R. 99 W, 5TH PM, ND, SEC. 33 LOTS 3,4; WILLIAMS COUNTY, 71.60 AC PD" (hereinafter "Parcel 31"). (Exhibit A hereto.)

15. The identification of Parcel 31 did not indicate that the United States owned less than 100 percent of the oil and gas rights in the parcel.

---

<sup>1</sup> The Montana State Office has jurisdiction over North and South Dakota as well.

16. In compliance with the instructions contained in the Lease Sale Notice, and because the production of oil and gas is allocated on an acreage basis, Plaintiff calculated its bid and rental payment on Parcel 31's containing 71.60 acres.

17. Plaintiff was the successful bidder for Parcel 31.

18. Pursuant to Plaintiff's successful bid, the BLM issued Lease NDM 105576 (the Lease) to Plaintiff as the lessee, effective September 1, 2013, covering all of the Parcel 31 lands, purportedly containing 71.60 acres. (Lease '576, Exhibit B hereto.)

**2. Lease '578 (Parcel 33).**

19. The Lease Sale Notice also identified the following as among the "Federal lands" made available for competitive sale: "PARCEL NUMBER 07-13-33, NDM 105578, NDM 97300-A0, T. 154 N, R. 100 W, 5TH PM, ND, SEC. 31 LOTS 2-4; WILLIAMS COUNTY, 89.50 AC PD" (hereinafter "Parcel 33"). (Exhibit A hereto.)

20. The identification of Parcel 33 did not indicate that the United States owned less than 100 percent of the oil and gas rights in the parcel.

21. In compliance with the instructions contained in the Lease Sale Notice, and because the production of oil and gas is allocated on an acreage basis, Plaintiff calculated its bid and rental payment on Parcel 33's containing 89.50 acres.

22. Plaintiff was the successful bidder for Parcel 33.

23. Pursuant to Plaintiff's successful bid, the BLM issued Lease NDM 105578 (the Lease) to Plaintiff as the lessee, effective September 1, 2013, covering all of the Parcel 33 lands, purportedly containing 89.50 acres. (Lease '578, Exhibit C hereto.)

24. By a check dated July 25, 2013, and pursuant to its successful bid, Plaintiff completed its payments to the BLM of \$1,439,856 for Lease '576 and \$719,820 for Lease '578 (the Lease Payments).

25. The Leases were purportedly issued to Plaintiff under authority of the "Mineral Lands Leasing Act of 1920, as amended and supplemented (30 U.S.C. 181 et seq.)" and described the lands as "Public Domain Lands." (Leases, Exhibits B and C hereto.)

26. Among other things, the Leases promised and purported to grant to Plaintiff the "exclusive right to ... extract, remove and dispose of all the oil and gas (except helium) in the lands described in Item 3," which described Parcels 31 and 33, respectively. (*See id.*)

**B. The BLM Notices.**

27. On May 19, 2015, the BLM notified Plaintiff that 47.60 acres of the land in Lease '578 were "officially recognized as eroded" and submerged by the Missouri River (BLM Notice for Lease '578, Ex. D hereto.)

28. On approximately July 20, 2015, the BLM, Montana State Office, notified Plaintiff that all of the lands in Lease '576, with the exception of a minuscule 0.40 acres

were "officially recognized as eroded" and submerged by the Missouri River (BLM Notice for Lease '576, Ex. E hereto.)

29. The BLM Notices explained that the land was recognized as eroded because on July 3, 2014, the BLM had officially adopted a survey by the U.S. Army Corps of Engineers of the lands at issue.

30. The survey had shown that over the years, gradual erosion of the Right Bank of the Missouri River had caused the river to change course, with 99.44% of Parcel 31 and 53.28% of Parcel 33 submerged by the new course.

31. Land beneath the riverbed of a navigable waterway (such as the Missouri River) is owned by the state in whose boundaries those waters run.

32. When a navigable river changes course through erosion, the state obtains title to the land under the river's new course.

33. Accordingly, the United States lacks title to eroded lands submerged by the Missouri River.

34. Upon information and belief, the survey "officially" adopted by the BLM in 2014 had actually been concluded by the United States as early as 1953.

35. In fact, a survey of the area approved by the Army Corps of Engineers on August 6, 1953, reflects the erosion shown in the 2014 survey maps and the partial or near-total submergence of Parcels 31 and 33.

36. Therefore, the affected lands within Parcels 31 and 33 were underneath the bed of the Missouri River when the Leases were issued.

37. The BLM has not disputed that the affected lands within Parcels 31 and 33 were underneath the bed of the Missouri River when the Leases were issued.

38. Because the affected lands within Parcel 31 and 33 were underneath the bed of the Missouri River when the Lease was issued, the United States did not have title to the affected lands within Parcels 31 and 33 when the Leases were issued.

39. Because the United States did not have title to the affected lands within Parcels 31 and 33 when the Leases were issued, the United States could not grant the exclusive right to Plaintiff to extract, remove, and dispose of all the oil and gas in the affected lands within Parcels 31 and 33.

40. Moreover, because the United States did not have title to the affected lands within Parcels 31 and 33 when the Leases were issued, BLM was not authorized to issue the Leases, as the Mineral Leasing Act only allows leasing of lands owned by the United States. *See* 30 U.S.C. §§ 181, 226.

**C. TDB's Attempts to Obtain a Refund from Agencies of the Department of the Interior (Lease '576) and its Appeal to the IBLA.**

41. On August 28, 2015, Plaintiff sent a Request for Refund to the Office of Natural Resources Revenue, Financial Management, Financial Services, requesting a refund of \$1,420,360.76, plus interest of \$47,769.95, reflecting 71/72 of the bonus and rentals paid for Lease '576. (August 28 Letter, Exhibit F hereto.)

42. The August 28 Letter was copied to the BLM, Montana State Office, and the Secretary of the Interior.

43. On September 3, 2015, the Montana State Office of the BLM issued its Decision denying Plaintiff's request for a refund. (September 3 Decision, Ex. G hereto.)

44. The September 3 Decision stated in part that "the recognized Federal minerals covered by oil and gas lease NDM 105576 were in effect until the resurvey was officially filed effective July 3, 2014."

45. On September 11, 2015, Plaintiff appealed the September 3 Decision to the IBLA pursuant to 43 C.F.R. 4.411.

46. On October 9, 2015, Plaintiff filed its Statement of Reasons with the IBLA, arguing among other things that Plaintiff was entitled to a refund under both 30 U.S.C. § 1721a (FOGRMA) and 43 U.S.C. § 1734(c) (FLPMA).

47. On December 19, 2018, the IBLA issued an Order on Plaintiff's appeal, upholding the BLM's denial of a refund under FOGRMA but holding that the BLM erred in relying on certain guidance in denying a refund under FLPMA. The IBLA remanded the matter to the BLM for reconsideration of Plaintiff's right to a refund under FLPMA.

**D. Plaintiff's Attempts to Obtain a Refund from Agencies of the Department of the Interior (Lease '578) and its Appeal to the IBLA.**

48. On June 8, 2015, Plaintiff sent a Request for Refund to the Office of Natural Resources Revenue, Financial Management, Financial Services, requesting a



refund of \$384,144, plus interest of \$12,207.19, reflecting 48/90 of the bonus and rentals paid for Lease '578. (June 8 Letter, Exhibit H hereto.)

49. The June 8 Letter was copied to the BLM, Montana State Office, and the Secretary of the Interior.

50. On June 22, 2015, the Montana State Office of the BLM issued its Decision denying Plaintiff's request for a refund. (June 22 Decision, Ex. I hereto.)

51. The June 22 Decision stated in part that "the recognized Federal minerals covered by oil and gas lease NDM 105578 were in effect until the resurvey was officially filed effective January 29, 2014."

52. On July 16, 2015, Plaintiff appealed the June 22 Decision to the IBLA pursuant to 43 C.F.R. 4.411.

53. On August 14, 2015, Plaintiff filed its Statement of Reasons with the IBLA, arguing among other things that Plaintiff was entitled to a refund under both 30 U.S.C. § 1721a (FOGRMA) and 43 U.S.C. § 1734(c) (FLPMA).

54. On December 19, 2018, the IBLA issued an Order on Plaintiff's appeal, upholding the BLM's denial of a refund under FOGRMA but holding that the BLM erred in relying on certain guidance in denying a refund under FLPMA. The IBLA remanded the matter to the BLM for reconsideration of Plaintiff's right to a refund under FLPMA.

**E. Plaintiff Has A Statutory Right to Judicial Review.**

55. More than 33 months have passed since Plaintiff requested refunds pursuant to the June 8 Letter and the August 28 Letter.

56. Accordingly, pursuant to 30 U.S.C. § 1724(h), Plaintiff has a right to judicial review of the Interior Secretary's deemed denial of Plaintiff's refund requests.

**F. Plaintiff Has Received No Value From the Leases.**

57. Plaintiff did not nominate the Parcel 31 or 33 lands for the competitive bid sale conducted by the BLM pursuant to the Lease Sale Notice, and has continuously been the lessee under the Leases since they were issued.

58. Plaintiff has received no revenue or other remuneration as a result of its ownership of the Leases.

59. Plaintiff has received no offers to purchase all, or any part of, the Leases from any person or company.

60. When Plaintiff made its bid to lease Parcels 31 and 33 in July 2013, Plaintiff had no knowledge that the United States was not the owner of the land as presented at the Competitive Oil and Gas Lease Sale, or that a review and land survey was being, or had been, conducted for these lands.

61. Plaintiff reasonably and fully relied on the land description provided by the BLM for the sale and first learned that the lands were not owned by the United States upon receipt of the BLM Notices in 2015.

62. Because the United States has been unable to grant Plaintiff the exclusive right to extract, remove and dispose of the oil and gas within and underlying the vast majority of Parcel 31 and the majority of Parcel 33, the Leases have minimal value to Plaintiff.

**FIRST CLAIM FOR RELIEF**  
**(43 U.S.C. § 1734)**

63. Plaintiff incorporates herein the allegations of all preceding paragraphs.

64. Under 43 U.S.C. § 1734(c), if it appears to the Secretary of the Interior [or his or her designee] that a person "has made a payment under any statute relating to the ... lease ... of public lands which is not required or is in excess of the amount required by applicable law and the regulations issued by the Secretary, the Secretary, upon application or otherwise, may cause a refund to be made from applicable funds."

65. Longstanding precedent from the IBLA establishes that a partial or total refund is appropriate where (1) the lease should never have been issued, (2) the lessee derived no benefit from possession of the lease during the time the lessee held it, and (3) there is no evidence of *mala fides* or other factors militating against repayment. *E.g.*, *Elaine D. Berman; John M. Beard*, 140 IBLA 173, 179 (Aug. 29, 1997).

66. Plaintiff is entitled to a refund under the above-described factors.

67. The failure of the Interior Department, the Secretary thereof, the BLM, and the ONRR to refund Plaintiff's Lease Payments and subsequent rentals paid on the

Leases, contrary to the Department's own precedent and under the circumstances of this matter, is arbitrary, capricious, an abuse of discretion, and otherwise contrary to law.

68. Plaintiff therefore asks the Court to order Defendant to issue a refund to Plaintiff of at least \$1,804,504.76, plus interest.

**SECOND CLAIM FOR RELIEF**  
**(Federal Oil and Gas Royalty Management Act)**

69. Plaintiff incorporates herein the allegations of all preceding paragraphs.

70. 30 U.S.C. § 1702(25) defines the term "obligation," in connection with the Secretary of the Interior, to include the duty of the Secretary "to pay [or] refund ... monies including (but not limited to) ... the principal amount of any ... rental, bonus ... [or] any interest."

71. 30 U.S.C. § 1721a(a)(1) states that if, during the "adjustment period," a lessee determines that a refund is necessary to correct an overpayment of an obligation, the lessee may request a refund during the adjustment period.

72. The "adjustment period" is defined as "the six-year period following the date on which an obligation became due."

73. 30 U.S.C. § 1721a(b)(1) states that a request for a refund is sufficient if it (A) is made in writing to the Secretary [or its designee agency or office], (B) identifies the person entitled to the refund, (C) provides information that enables the Secretary to identify the overpayment for which the refund is sought, and (D) provides the reasons why the payment was an overpayment.

74. Since the Leases, by definition, were invalid from the start, the Lease Payments and all subsequent payments in connection with the Leases were, by definition, an overpayment.

75. Plaintiff's refund requests satisfy the requirements for a request for a refund.

76. The failure of the Interior Department, the Secretary thereof, the BLM, and the ONRR to refund Plaintiff's Lease Payments and subsequent rentals paid on the Leases, contrary to the Department's own departmental precedent and under the circumstances of this matter, is arbitrary, capricious, an abuse of discretion, and otherwise contrary to law.

77. Plaintiff therefore asks the Court to order Defendant to issue a refund to Plaintiff of at least \$1,804,504.76, plus interest.

**THIRD CLAIM FOR RELIEF**  
**(Breach of Contract)**

78. Plaintiff incorporates herein the allegations of all preceding paragraphs.

79. Plaintiff performed all of its obligations under the Leases.

80. Defendant breached the Leases by, among other things, failing to provide Plaintiff with the exclusive right to extract, remove and dispose of all the oil and gas in Parcels 31 and 33.

81. As a result of Defendant's breach of the Leases, Plaintiff has been damaged in an amount to be proved at trial, which includes, at a minimum, the sum of \$1,804,504.76, plus interest.

**FOURTH CLAIM FOR RELIEF**  
**(Rescission and Restitution)**

82. Plaintiff incorporates herein the allegations of all preceding paragraphs.

83. The Leases were legally invalid when they were issued, because as explained above, the Mineral Leasing Act only allows leasing of lands owned by the United States, and the United States did not own all of Parcels 31 and 33 when the Leases were issued.

84. Moreover, the Leases are voidable for failure of consideration because when Defendant promised to grant the exclusive right to extract, remove, and dispose of all the oil and gas in Parcels 31 and 33, the Defendant did not possess those rights.

85. The Leases are also voidable under the doctrine of mutual mistake because (i) the United States' ownership of Parcels 31 and 33 and the underlying minerals was a basic assumption upon which the Lease was made, and (ii) the United States' lack of ownership of Parcels 31 and 33 and their underlying minerals had a material effect on the parties' agreed exchange of performances.

86. Alternatively, the Leases are voidable under the doctrine of unilateral mistake because (i) the United States' ownership of Parcels 31 and 33 and the underlying minerals was a basic assumption upon which the Lease was made, (ii) the United States'

lack of ownership of Parcels 31 and 33 and their underlying minerals had a material effect on the parties' agreed exchange of performances, (iii) the Defendant had reason to know of the mistake by virtue of the 1953 survey, (iv) the Defendant's fault caused the mistake by offering Parcels 31 and 33 for lease when the Defendant was in possession of the 1953 survey, and (v) enforcement of the Leases and allowing the Defendant to retain the Lease Payments would be unconscionable.

87. Plaintiff is therefore entitled to rescission of the Leases and refund of at least \$1,804,504.76, plus interest.

**FIFTH CLAIM FOR RELIEF**  
**(Money Had and Received)**

88. Plaintiff incorporates herein the allegations of all preceding paragraphs.

89. Because the Leases were invalid when they were issued, the Defendant had no legal right to solicit and receive the Lease Payments or related payments in connection with the Leases.

90. Plaintiff is therefore legally entitled to a refund of at least \$1,804,504.76, plus interest, under the doctrine of money had and received, in that Defendant is holding funds received from Plaintiff which in equity and good conscience should be paid to Plaintiff.

**SIXTH CLAIM FOR RELIEF**  
**(Taking Without Just Compensation)**

91. Plaintiff incorporates herein the allegations of all preceding paragraphs.

92. The BLM and IBLA have made statements in connection with this matter that seem to imply that because the Montana State Office was relying on the officially recognized survey when it made Parcels 31 and 33 available for leasing, the United States actually did own mineral rights in those lands when they were leased.

93. If that statement is correct, then the Leases actually did convey to Plaintiff the exclusive right to extract, remove, and dispose of all the oil and gas in Parcels 31 and 33, and such exclusive right is a valuable property right.

94. If so, then the BLM's subsequent adoption of the 1953 survey and determination to cancel almost all of Lease '576 and more than half of Lease '578 without refunding the appropriate portion of the Lease Payments constitutes a taking of Plaintiff's property rights without just compensation in violation of the Fifth Amendment to the United States Constitution.

95. Therefore, if the BLM's position is correct that the United States owned mineral rights in the affected lands on Parcels 31 and 33 when the Leases were issued, then Plaintiff is entitled to compensation for the BLM's subsequent taking of those rights, in an amount to be proved at trial, plus interest.

#### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff asks that the Court enter judgment in its favor and against the United States in an amount of at least \$1,804,504.76, plus prejudgment and postjudgment interest, plus costs and expenses of trial pursuant to law and the Equal



Access to Justice Act. Plaintiff further asks for all additional relief the Court deems proper.

DATED: July 10, 2019

ANDERSON & KARRENBERG

/s/ Stephen P. Horvat

Stephen P. Horvat, Attorney of Record

ANDERSON & KARRENBERG

50 W. Broadway, #700

Salt Lake City, Utah 84101-2035

Telephone: (801) 534-1700

Facsimile: (801) 364-7697

[shorvat@aklawfirm.com](mailto:shorvat@aklawfirm.com)

*Attorneys for Plaintiff TDB Resources*

LIST OF EXHIBITS

- Exhibit A: July 15, 2013 Notice of Competitive Oil and Gas Lease
- Exhibit B: Lease NDM 105576
- Exhibit C: Lease NDM 105578
- Exhibit D: May 19, 2015 Notice of Decision Regarding Lease '578
- Exhibit E: July 20, 2015 Notice of Decision Regarding Lease '576
- Exhibit F: August 28, 2015 Request for Refund Regarding Lease '576
- Exhibit G: September 3, 2015 Decision Denying Request for Refund Regarding Lease '576
- Exhibit H: June 8, 2015 Request for Refund Regarding Lease '578
- Exhibit I: June 22, 2015 Decision Denying Request for Refund Regarding Lease '578